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p 22F

File No. O.S.N.D.T. W. University/57
Legal Department
A BRANCH

A/57

Subject:— Opinions under Shreemati Damodar Thackersey Indian Womens University Act, 1949

File No. O.S. N.D.T. W. University/57
137-A

C O N T E N T S.

Legal Department File No. G.S.N.D.T. U. Univ./55

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50.

Legal Department.

On 24th June 1939 the Trustee of Gordhandas Khetsy Trust offered a donation of one lac of rupees to the Shreemati Nathibai Damodar Thackersey Indian Women's Univiersity (then a society registered under the Societies Registration Act hereinafter referred to for the sake of brevity as Society) on certain conditions out of which the following are the material conditions for the purpose of the present reference.

(1) The donation shall be utlized for or towards the erection of a building.

(2) The building to be given the name of the deceased Shah Gordhandas Khetsy.

(3) A bust or oil painting of the deceased Gordhandas Khestsy to be placed in the building.

(4) The Trustees to hand over Government Promissory notes of the face value of one lac of rupees to the Society.

(5) The Khetsy Trustees to nominate one Trusee on the Board of Trustees of the Society.

(6) The said trustee shall nominate one fellow to the senate of the society

(7) The Society shall give free studentships to 10 Bhatia girls.

The Society by their resolution dated 30th June 1939 accepted the donation. Conditions Nos. (5) to (7) were accepted in the following terms:-

(C) The trustee to be nominated by the Khestsy Trust to be a special trustee in addition to the members of the Society appointed by its regulations.

(D) The Khetsy Trust should have a right to nominate one fellow under the regulations of the society relating to beneficieries.

(E) The Khestsy Trust shall have a right to nominate ten patrons on the electorates of the Society.

It appears that the amount of the donation has been handed over by the Khetsy Trust to the Society and presumably the Government Promissory notes of the donation amount have been transferred to the name of the Society. In her letter the Vice-Chancellor of the Shreemati Nathibai Damodar Thackersey Indian Women's University dated 6th October, 1950 stated that "with the passing of the Act however many of the conditions as those under clause C. D, E have become null and void and the Khetsy Trust has no objection to treat the sum as if made over the University." In other words the view of the Vice-Chancellor is that afterk the recognition of the Society as a statutory University, the donation does not become the property of the Society and vests back in the original donors. The original donors then can exercise their right to hand it over to the new University.

2. The first question for consideration is whether the above view is correct. It will appear from the preamble of the Shreemati Nathibai Damodar Thackersey Indian Women's University Act, 1949 that it was the Society which requested Government to initiate legislation for the purpose of obtaining Society's recognition. Thereafter Government appointed a Committee and after considering the report of the Committee came to the conclusion that the statutory recognition may be granted and a University should be established. Accordingly Bombay Act LI of 1949 was passed. Section 62 of that Act provides that the Society shall be dissolved and all property moveable and immoveable of the said Society shall be transferred and vest in the University. Clause(iv) of the said section also provides that any document which comprises any bequest, gift, terms or trust in favour of the Society shall on the commencement of this section be

construed as if the University was therein named instead of the Society. These provisions make it clear that amount of the money donated to the Society and the Government Promissory notes held by the Society in respect of the said donation would become the property of the University and the Trustees of the Khetsy trust cannot contend that the amount or the notes would revert to them. There is no condition either in the letter of the Khetsy Trust of 1939 or the resolution of the Society implying reversion to the donors. cannot be a resulting trust in such a case and even according to the general principle of law a condition of forfeiture upon the alteration of a trust is not allowed to take effect if the trusts are altered by a scheme established by a competent authority (Halsbury's Laws of England, Vol. IV p. 210).

The courts have gone to the length of holding that there is no lapse when the gift is for a particular charitable work which is still being carried on through my a different body (In re Watt (1932) 2 Ch. 243 also at p. 236).

3. The Khetsy trust will not also be able to contend that the original conditions which were accepted by the Society must be fulfilled by the new University. Under those conditions they had a right of represenation to the old Society and its Senate. The donation made by the Khetsy trust is in the nature of a charitable gift subject to a subsequent condition such conditions may be (1) a common law condition, (2) conditions which equity will enforce, (3) conditions accompanied by an executory limitation or gift over: The gift is not subject to a common law condition as it does not contain a provision for forfeiture (see Tuder on Charities p. 79), nor is it obviously of the third class. In regard to the question whether equity can enforce the conditions attached to it, so far as conditions (D) to (E) are concerned i.e. nomination to the Senate or the trusts of the Society, the Legislature in enacting the Shreemati Nathibai Damodar Thackersey Indian

provisions of the said Act these conditions have become impossible of performance. This impossibility of their performance is not on account of any act or conduct on the part of the donor ordance. The conditions (C) ,(D) and (E) in the resolution of the Society accepting the donation are subsidiary to the main purposes of the gift and have become impossible of perormance due to the force of circumstances. This would not make the gift void. (See In re Robinson, Wright v. Tugwell (1923) 2 Ch.332.)

4. The second point for consideration is whether under the provisions of the Shreemati Nathibai Damodar Thackersey Indian Women's University Act the Khatsy trust can be permitted to nominato a fellow to the Senate of the University Section 15 Class II (C) and (H) nominating gives to right of to the donors of one lakh or more. Class (C) relates to the individual donors while class (D) relates to a body Both the clauses provide that the donation must be to or for the purposes of the University. It is true that the donation was made before the University came into being. But section 62(iv) provides that in all documents relating to bequests or gifts to the Society, the references to the Society shall be construed as references to the University when section 62 comes into operation. There is no objection therefore to hold that the donations was to or for the purposes of the University. But both the clauses provide that the donor shall have a right to be a member or to nominate a fellow for a period of 20 years from the date of the acceptancss of the donation by the Senate. Both the clauses also provide that the period of 20 years for the representation of such donors is to commence from the date of acceptance of the donation by the Senate. Although the donation can be held to be to or for the purposes of the University difficulty arises for the calculation of the period of 20 years for the continuance of the representation . Neither the Committee nor the Society brought this

particular donation to the notice of Government when the Bill was being drafted. If they had done so, Government or the Legislature would have considered whether any provision could be inserted to give the Khetsy trust representation. It would however appear that when the question of donations to other constituent bodies was brought to the notice of Government, a provision for giving them representation has been made in Class (E) of section 15. It may appear anomalous that a donor who has donated one lakh of rupees should not have a right of representation to the Senate, while persons who are the donors of constituent bodies of the University mentioned in Class (E) would get such a right. In the present case however as pointed out above, section 62 expressly provides that any document comprising any gift shall on the commencement of that section be construed as referring to the University. So far as the first part of Class (C) and(D) of section 15 is concerned, the Khetsy trust can be held to be a donor of the Class mentioned therein. But it is difficult to give it representation on account of the latter portion of the Clauses which relates to the acceptance by the Senate. Instead in this case section 62 itself makes that gift as the gift to and for the purposes of the University. The difficulty can be obviated and the anomaly an be solved by having recourse to the powers of Government under section 60. By reason of the insertion of the provisions of section 62, the case of the Shreemati Nathibai Damodar Thackersey Indian Women's University is distinguishable from that of the Gujarat Unigersity. This therefore seems to be a fit case for the exercise of the powers of Government under section 60. That section empowers Government to do any thing by order for removing the difficulty. If the Vice-Chancellor and the Khetsy Trust agree, the Government should pass an order that after section 62 comes into effect, i.e. after the donation becomes the property of the University in accordance with the provisions of the said section, the Khetsy

Trust shallbe deemed to be a donor body which has donated one one lakh of rupees to or for the purposes of the University and that the date of this acceptance should be deemed to have taken place on the date on which section 62 comes into force. In that case they will have a right to nominate a fellow to the Senate for 20 years from the said date.

Sd/- J.R.Dhurandhar.
6.1

Additional Secretary to Government.

U.R. to E.D.No.405 , dated the 8th January , 1951.

V.M.D./27.6
40.

Legal Department.

S.N.D.T. Women's University Act, 1949 Sect.15(1) B (i) Whether Parliamentary Secretary (Education) can be nominated as member of the Senate by the Hon'ble Chief Minister.

The question for consideration is whether under the S.N.D.T. Women's University Act, 1949, it would be open to the Hon'ble the Chief Minister to nominate the Parliamentary Secretary (Education) as a member of the Senate in his place.

2. Section 15(1) B (i) of the S.N.D.T. University Act, 1949, provides for the Minister of Education, Bombay, or an officer of Government nominated in this behalf by the Minister being a member of the Senate of the University. Under this provision it is feasible for the Hon'ble the Chief Minister to appoint in his place "an officer of Government". The question therefore boils down to whether Parliamentary Secretary (Education) can be considered to be an officer of Government within the meaning of section 15. In this connection attention is invited to R.L.A's opinion No. 4618 dated the 6th May 1947, where the position of Parliamentary Secretaries has been considered in detail. The R.L.A. has observed in para 4 of that opinion that although Parliamentary Secretaries cannot be treated as members of the public services for the purposes of the Constitution or as Government servants to whom the Bombay Civil Services (Conduct, Discipline and Appeal) Rules apply, they must be regarded broadly speaking as Crown servants. The R.L.A., therefore, advised that the principle that Government servants should not be allowed to engage in trade etc., should be extended to Parliamentary Secretaries. There is nothing in the S.N.D.T. Women's University Act which would suggest that the appointment of a Parliamentary Secretary as a member of the Senate is precluded. The intention only appears to be that if the Minister of Education does not find convenient to work on the Senate he can nominate

an officer conversant with educational matters. Where does not, therefore, appear any objection to Parliamentary Secretary (Education) being appointed on the Senate under section 15(1) (B) (i) of the Act.

Sd/- J.R.Dhurandhar.
3.2

Additional Secretary to Government.

U.R. to H.D. No. 2814 dated the 14th February 1951.

V.M.D./27.6
40.

Office of the R.L.A.

The Vice-Chancellor of the Shreemati Nathibai Damodar Thackersey Women's University in his letter at pages 1-2 ante reports that following the practice of the University in the past to issue S.S.C. Examination Certificates to candidates passing the Entrance Examination of the University excluding English, the University has this year accepted forms and enrolled names for the S.S.C. Examination to be held in 1951. He therefore requests that an order may be issued by Government under section 60 of the S.N.D.T. Women's University Act, 1949, facilitating the holding of the S.S.C. Examination and conferring of certificates by the University as a special case. The R.L.A. is requested to advise whether the course suggested by the Vice-Chancellor is legally feasible.

2. The proposal made by the Vice-Chancellor does not appear to be feasible nor does it appear that an order can be made by the State Government under section 60 of the S.N.D.T. Women's University Act, 1949, enabling the University to hold the examination. Under that section an order can be issued by the Government if any difficulty arises (i) as to the first Constitution or reconstitution of any authority of the University after the coming into force of the Act, or (ii) otherwise in first giving effect to the provisions of the Act. Neither of these two circumstances is in existence in the present case. Section 60 would not therefore be attracted; and no order can be made by Government as proposed by the Vice-Chancellor.

3. In this connection attention is also invited to section 34 of the Act, which prescribes that no student shall be enrolled as a student of the University unless she has passed either (i) the S.S.C.Examination conducted by the S.S.C. Examination Board, or (ii) the Entrance Examination held by the University with the permission of Government or (iii) any other examination prescribed equivalent to the above examinations. Thus under the S.N.D.T. Women's University Act,

the University is empowered to hold an Entrance Examination subject to the consent of the State Government. The other examinations which the University can hold are in respect of persons who have pursued approved courses of study in the University or in affiliated Colleges (cf. section 4(9) of the Act.) The S.S.C. Examination which is proposed to be held by the University has nothing to do with the admission of students to the University. The holding of a S.S.C. Examination of their own as proposed appears beyond the scope of the S.N.D.T. Women's University Act, 1949. The fact that the University has accepted forms from candidates for their S.S.C. Examination will not be a liability of the nature contemplated under section 62(ii) of the Act. Also such liability, if any, to examine the students enrolled for the S.S.C. Examination and to confer certificates on the successful candidates, being opposed to the Statute would not be binding on the S.N.D.T. Women's University and section 62(ii) of the Act would not be attracted.

4. In these circumstances the proposal made by the Vice-Chancellor does not appear to be feasible.

Sd/- M.R.Dhurandhar.
2.4

Remembrancer of Legal Affairs.

U.R. to E.D.No. 5311, dated the 3rd April, 1951.

V.M.D./27.6
4c.

Office of the R.L.A.

The question raised by Secretary, Education Department has been referred to the Advocate General for his opinion. A copy of the Statement of the case forwarded to the Advocate General is sent herewith. The Advocate General's opinion will be furnished to the Education Department as soon as it is received. In the meanwhile all the papers excluding the Education Department file containing the consent decree are returned herewith.

Sd/- J.R.Dhurandhar.
12.3

Remembrancer of Legal Affairs.

U.R. to E.D. No. 270 - Confl., dated the 12th March 1951.

V.M.D./27.6
40.

Office of the R.L.A.

Statement of the Case.

By the Consent Decree in suit No. 255 of 1935 filed in the High Court of Judicature at Bombay the executrix and executors of thewill of Sir Vithaldas Damodar Thakersey were directed to invest Rs. 15 lakhs in Government - securities and to pay the corpus or its income to the University subject to certain terms and conditions,. One of the conditions was as follows:-

" The eldest male member for the time being of the family of Damodar Thackersey, the father of the said Sir Vighaldas Damodar Thackersey, shall be entitled to nominate 5 members on the Senate of the said University and that such members shall be exempted from the requsitd qualifications for fellowship of the said University."

The University had accordingly made necessary changes in its constitution. It has been now contended by Shri Krishnaraj Thackersey that under section 61 of the Shreemati Nathibai Damodar Thackersey Women's University Act, 1949, all the rights, privileges, obligations etc. acquired, accrued or incurred under the consent decree in Civil Suit No. 255 of 1935 have been saved subject to the provisions of section 15. That section does not provide that the male head of the family of Damodar Thackersey may nominate five members on the Senate of the Statutory University. The trustees of the estate of Vithaldas Thackersey therefore consulted Shri M C.Setalvad on the question whether since the Shreemati Nathibai Damodar Thackersey Women's University Act, 1949, does not recongise the right of the Thackersey family to nominate 5 persons on the Senate, the trustees would be within their right if they discontinued payment of the interest and also disowned their liability to hand over the corpus to the Statutory University. In answer to this question the

learned counsel says that as under the trust the Government Promissory Notes are not apart "pursuant to the said decree" and "upon the terms and conditions and subject to the provisions of the decree", it is the duty of the trustees to pay the corpus or its income only upon the conditions of the decree and subject to its provisions being carried out and that as the eldest male member of the family is prevented from exercising the right of nominating 5 members, the trustees can refuse to pay the interest or to hand over the corpus to the University. The question for consideration is whether the above view of Shri Setalvad is correct.

2. It is true that under section 15(1) Class II (B) of the Shreemati Nathibai Damodar Thackersey Women's University Act, 1949, 11 members are to be nominated by the Chancellor one of whom should be a descendant of Damodar Thackersey; and the right of the eldest member of the Thackersey family to nominate 5 members on the Senate has not been recognised. It may however, be observed that the plaintiff University in Suit No. 255 of 1935 was the society known as the Shreemati Nathibai Damodar Thackersey Indian Women's University registered under the Societies Registration Act, 1860. It was on the Senate of this University that the eldest male member of the family of Damodar Thackersey was to nominate five members under the consent decree. That society stands dissolved under section 62 with effect from the date on which that section came into operation. It will also appear from the Consent Decree that both the parties to the consent decree were aware of the possibility of the University receiving necessary charter or recognition from the Government in near future. The said University through its Chancellor had requested the Government to initiate legislation for the purpose of obtaining statutory recognition. The composition of the Senate of the Statutory University is provided in section 15 of the Act under which the eldest male member of the family of Damodar Thackersey has not been given the right to nominate five members on the

Senate. It is however provided thereunder that a descendant of Damodar Thackersey is to be nominated on the Senate. The Legislature is all powerful and is competent to determine the composition of the Senate even to the extent of overriding the terms of the consent decree under controversy. It was therefore made clear in section 61 that subject to the provisions of section 15 nothing in this Act shall affect in any way any right, privilege, obligation or liability acquired, accured or incurred under the Consent Decree.

3. It appears to me "that there cannot be a resulting Trust in a case where there is no condition implying reversion to the donors and even according to the general principle of law a condition of forefeiture upon the alteration of a trust is not allowed to take effect if the trusts are altered by a scheme established by a competent authority (Halsbury's Laws of England, Vol. IV p. 210). The courts have gone to the length of holding that there is no lapse when the gift is for a particular charitable work which is still being carried on though by a different body (In re Watt (1932) 2 Ch. 243 also at p..236). The failure of the performance of the condition of providing for the right of nomination on the Senate by the eldest male member of the family of Damodar Thackersey is not on account of any act or conduct on the part of the donee. It has become impossible of performance due to the force of circumstances. This would not make the gift void. (See In re Robinson, Wright vs. Tugwell (1923) 2 Ch. 332)." Attention of the Advocate General is also invited to the case reported in 1950 1 Ch. 637 In re Morgan's Will Trusts: Lowarne vs. Minister of Health.

It would further appear that one of the terms of the consent decree which is binding upon the trustees under section 61 of the Act is as follows:-

"And this Court by and with such consent doth hereby order that the defendants do deliver to the said

University the said 3½ per cent Government Promissory Notes of the face value of Rs. fifteen lakhs purchased and set apart and held as trustees by the defendants for the said University as aforesaid as soon as the University receives necessary Charter from the Government or in the alter-native such kind of recognition from Government as would on the one hand ensure the permanency of the said University and on the other hand give assurance to the public that the University would be conducted on right principles."

4. As the Shreemati Nathibai Damodar Thackersey University has now been given the statutory recognition, it is the bounden duty of the trustees to deliver to the said University the said 3½ perx cent Government Promissory notes of the face value of Rs. fifteen lakhs which the defendants were bound to purchase, set apart and hold as Trustees before the 17th day of April 1942. There is nothing in the consent decree to indicate that it is binding on the statutory University to recognize the right of the eldest male member of the family of Damodar Thackersey to nominate five members on the Senate of the Statutory University. Not only that but that the endowment is a perpetual endowment isx clear from the consent decree which inter alia provides:-

" And that the said payment of Rs. 52,500 as herein above provided shall be made to the said University in perpetuity and shall cease only when the said 3½ per cent Government Promissory notes of Rs. 15 lakhs are made over to the said University."

In view of the above provision the contention of the trustees that they cannot be called upon to hand over the corpus of the trust owing to the Statutory Univ-rsity is not correct.

5. As the point whether the trustees are entitled to withhold payment of the interestand refuse to hand

over the corpus of the trust on the ground that the University is not in a position xk to accept on its Senate five members nominated by the Thackersey family is however not free from doubt, the Advocate General is kindly requested to advise. The Advocate General is requests to treat the matter as very urgent.

Sd/- J.R. Dhurandhar.

Remembrancer of Legal Affairs.

U.R. to Advocate General No. 262-Confl ., dated the 10th March 1951.

V.M.D./27.6
40.

RE: S.N.D.T. INDIAN WOMEN'S UNIVERSITY.

QUERISTS.

OPINION

Q. 1. Whether it is competent to the Government or Legislature to affect prejudicially and take away the rights of the Trustees of the Estate of Sir Vithaldas, by an Act?

Yes. The legislature is all powerful and it can take away all vested rights. The legislation, however, does not seem directly to affects the Trustees or the Estate of Sir Vithaldas. The Estate and the Trustees have agreed to make certain payment on certain conditions . The result of what the legislature has done is to prevent the fulfilment of one of the conditions.

Q. 2. And if the Government do so whether it is competent to the Trustees to discontinue payment of interest and also to disown their liability to hand over the corpus?

Under the Trusts the Government Promissory Notes are not spart "pursuant to the said decree" and "upon the terms and conditions and subject to the provisions of the said decree." It would therefore be the duty of the Trustees to pay the corpus or its income upon the conditions of the decree and subject to its provisions being carried out. The decree creates mutual rights and obligations in the University and the Estate. It confers a right on the eldest male member of the family to nominate five members on the Senate of the University in the manner mentioned in the decree. The University must make it possible for this right to be exercised. If for the exercise of University is not able to provide for the exercise of this right, it would not carry out one of its obligations under the decree. The Trustees would then have a rights to say that ask the University is not in a position to carry out this obligations, they cannot be called upon to perform their part of the promise contained in the decree.

The fact that the prevention arises by reason of the constitution of the University provided by law making it not possible to carry it out, will, In think, be no answer to the contention of the Trustees. So long as the Consent Decree stands it would bind the parties and the Trustees would be bound to see that they carry out the Trust on the terms and conditions contained in the decree. The answer to this question is therefore in the affirmative.

Q. 3. Whether under the circumstances Counsel will advise the University to apply to the Government to amend the Act so as to leave totally unaffected the rights of the Trustees under the said Consent Decree?

Yes. Having regard to the nature of the matter the best course would be for the University and the Trustees to meet a representative of the Government for a discussion across the table with a view to find out a method of adjusting the situation.

Q. 4. In case the Government decline to amend the Act, would it be open to the Trustees to apply to the High Court whose decree is not being carried out for directions?

It would be open to the Trustees to apply tothe Court for directions as Trustees either by a petition or on an originating summons. This step need be taken only if a <u>via media</u> cannot be found after a discussion with Government.

Q. Generally.

I have nothing to add.

Sd/- H.C.Setalvad.

21.12.1950.

V.H.D./27.6
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ADVOCATE GENERAL'S CHAMBERS.
BOMBAY.

U.O.R. to the Advocate General
No. 262-Confl. dated 10.3.1951.

The consent decree in question provides that the defendants (the Trustees) should deliver to the University the 3½% Government Promissory Notes of the face value of 15 lakhs as soon as the University receives the necessary charter from the Government, or in the alternative, such kind of recognition from Government as would ensure the permanency of the University etc. The Shrimati Nathibai Damodar Thackersey University has now been given the statutory recognition; and the Trustees are bound to deliver up the Government Promissory Notes. This provision to my mind is entirely inconsistent with the continuance of the Trust or of any rights created thereby. The Trust deed proceeded on the footing that the Trustees have to pay the corpus of the income subject to certain conditions. This was an option which was given to the Trustees whereas the consent decree left no option, but obliged the Trustees to hand over the corpus. In my opinion the conditions of the deed thereby were eliminated.

2. Apart from this, under section 15(1), clause (ii) (b) of the Act of 1949, it is provided that 11 members are to be nominated by the Chancellor one of whom should be a descendent of Damodar Thackersey. If the Trustees desire that their right should be perpetuated, they should have stipulated for it by a term in the decree. As it is, the provision above mentioned says nothing about it and is inconsistent with such a right. The original society stands dissolved by reason of section 62 of the Act. The Legislature is all powerful, and it was open to it to override terms of the deed.

It was presumably for that reason that in section 61 it was stipulated that nothing in this Act should affect in any way the right, privilege, obligation, or liability incurred under the consent decree subject to the provisions of section 15. It is that section which provides for the composition of the senate and makes no mention of the Trustee's right to appoint.

3. It is idle for the Trustees in my opinion to claim that because the right is not provided for or is denied, they are entitled to withhold possession of the corpus of the Trust. The decree provides for the handing over of the corpus, and it seems to me that they must comply with that provision. The further contention of the Trustees that they can retain the corpus and pay the interest is equally unsustainable having regard to the provisions of the decree and the statute. I am, therefore, of the opinion that the Trustees are not entitled to claim the right to appoint 5 members of the senate as contended by them.

Sd/-

ADVOCATE GENERAL.

V.M.D./27.6
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Office of the R.L.A.

A copy of the Advocate General's opinion is sent herewith.

Sd/- J.R.Dhurandhar.
25.5

Remembrancer of Legal Affairs.

U.R. to E.D. No. 8324 dated, 26th May 1951.

V.M.D./27.6
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